GIBSON DUNN

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COLORADO'S EQUAL PAY FOR EQUAL WORK ACT TRANSPARENCY RULES SURVIVE MOTION FOR PRELIMINARY INJUNCTION CHALLENGING THEIR CONSTITUTIONALITY

To Our Clients and Friends:

Colorado's Equal Pay for Equal Work Act (EPEW), as well as the accompanying Rules and guidance, took effect on January 1, 2021. Prior to the new year, however, the Rocky Mountain Association of Recruiters (RMAR) sued the Colorado Department of Labor and Employment (CDLE) in the U.S. District Court for the District of Colorado, challenging the constitutionality of the law's compensation and promotion posting requirements. On May 27, 2021, after previously ordering supplemental briefs on the posting requirements' burdens on interstate commerce, Judge William J. Martinez denied the RMAR's request for a preliminary injunction to suspend enforcement of the posting provisions at issue.

Colorado's Equal Pay for Equal Work Act Posting Requirements

With a stated goal of aiding in achieving pay equity in Colorado, the EPEW has an expansive reach, covering all public and private employers that employ at least one person in Colorado. The law includes extensive compensation and promotion posting requirements, which employers—particularly multi-jurisdictional employers—have struggled with implementing. In fact, the posting provisions have proved so burdensome in practice that some employers have elected to wholly remove some employment opportunities from Colorado rather than navigate compliance difficulties. *See* https://www.9news.com/article/news/investigations/job-posting-labor-laws/73-7f2ac237-06fe-4353-8318-00a4b52d80bc.

Under the EPEW's compensation posting requirements, employers are required to "disclose in each posting for each job the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant." C.R.S. § 8-5-201(2) (2021). In addition to postings for jobs in Colorado, the requirement also reaches postings for all remote positions that could be performed in Colorado. 7 CCR 1103-13 (4.3)(B).

Additionally, the EPEW requires employers to "make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion to all current employees on the same calendar day and prior to making a promotion decision." C.R.S. § 8-5-201(1) (2021). Under the Rules, a "promotional opportunity" is broadly defined as "when an employer has or anticipates a vacancy in an existing or new position that could be considered a promotion for one or more employee(s) in terms of compensation, benefits, status, duties, or access to further advancement." 7 CCR 1103-13 (4.2.1). Postings are required even if no one in Colorado is qualified for the promotional opportunities. The promotion requirement applies widely and only allows for a few narrow exceptions, such as when employees are unaware they will be separated from their employers.

Background on *Rocky Mountain Association of Recruiters v. Moss*

In its initial complaint, the RMAR argued that: (1) the EPEW's posting requirements constitute unlawfully "compelled speech" in violation of the First Amendment; and (2) the requirements violate the Dormant Commerce Clause due to their excessive burden on interstate commerce and their conflict with other states' statutory schemes. The RMAR requested from the court a declaration that the posting requirements are unconstitutional, as well as a permanent injunction barring the CDLE's enforcement of the posting provisions. Additionally, the RMAR filed a motion for a preliminary injunction on December 31, 2020, which would prevent the posting provisions' enforcement until a decision on their legality is reached.

On April 21, 2021, Judge William J. Martinez held a hearing on the RMAR's motion for preliminary injunction. The court ordered supplemental briefings from the CDLE and RMAR on the burdens that the EPEW posting requirements place on interstate commerce—hinting that the court was potentially amenable to the RMAR's Dormant Commerce Clause argument. The supplemental briefs were filed on May 6, 2021, and response briefs were filed on May 17, 2021.

For the RMAR's supplemental brief, the court directed it to identify the two most burdensome aspects of both the compensation and promotion posting requirements. For the compensation posting requirements, the RMAR identified as most burdensome: (1) the requirement to post compensation for remote jobs or other jobs that "could" be performed in Colorado; and (2) the forced disclosure of confidential information and trade secrets. For the most burdensome aspects of the promotion posting requirements, the RMAR identified: (1) the requirement to notify Colorado employees of "promotional opportunities" anywhere in the world and to pause any hiring or promotions until such notice is provided; and (2) the lack of exceptions for trade secret disclosures, confidential searches, and corporate mergers and reorganizations. In its response brief, the CDLE argued that the RMAR's identified burdens were "simply operational or logistical burdens" on individual firms, which do not rise to cognizable burdens on interstate commerce under the Dormant Commerce Clause.

From the CDLE, the court requested a supplemental brief on why the operational compliance costs incurred by employers do not matter to Dormant Commerce Clause analysis. In its brief, the CDLE argued that the RMAR failed to show that interstate commerce would be unduly burdened, as individual companies' increased operational or compliance costs do not equate to a harm to the national market. It also argued that, because the EPEW's effects are felt primarily in Colorado (or equally inside and outside of Colorado), precedent dictates that the court should not engage in Dormant Commerce Clause balancing analysis at all. Finally, the CDLE contended that, even if the court proceeds with a balancing test, the RMAR's allegations are too broad and general to use as evidence in such a test. In response, the RMAR reiterated that the posting requirements burden interstate commerce by interfering with "a fundamental part of the process of talent acquisition and mobility nationwide (and worldwide)" and that the burdens on its members are representative of the burdens on interstate commerce.

Injunction Holding & Key Takeaways

On Thursday, May 27, 2021, Judge William J. Martinez denied the RMAR's motion for preliminary injunction, finding that the RMAR failed to demonstrate a substantial likelihood of success on the merits of its Dormant Commerce Clause or First Amendment claims. Notably, the court categorized the RMAR's request as a disfavored preliminary injunction and applied a heightened standard, with the RMAR bearing a heavier burden to show likelihood of success on the merits of its claims.

For the RMAR's Dormant Commerce Clause claim, the court found that the RMAR "failed to put forward the necessary evidence regarding the relative magnitude of the local benefits, as compared to the burdens on interstate commerce." That is, given the record's lack of specific evidence regarding the EPEW's harm to interstate commerce, the court could not effectively engage in the necessary balancing test. As such, the RMAR failed to establish a substantial likelihood of success on its Dormant Commerce Clause claim.

For the RMAR's First Amendment claim, the court found that the EPEW bears a reasonable relationship to a substantial government interest and that, at this stage, the RMAR failed to show that the posting provisions created an undue burden on employers. Specifically, the court noted that, based on testimony and common sense, the posting requirements rationally related to the law's goal of reducing the wage pay gap. Further, the court found that the requirements do not drown out employers' individual messages in job postings, because they can be satisfied "in short statements and by disclosing promotion opportunities available to some employees to current Colorado employees." The court was similarly unpersuaded by the RMAR's argument that the provisions chill commercial speech, because "employers are still able to recruit candidates with compensation rates for positions of the employers' choosing." Thus, the RMAR failed to show a substantial likelihood of success on its First Amendment claim.

It is worth noting that the RMAR's Dormant Commerce Clause claim failed due to the record's lack of evidence at this initial, pre-discovery stage of litigation. This leaves the door open for the record to be developed adequately, as the suit proceeds, with the types of specific evidence the court identified as necessary for determining whether the Dormant Commerce Clause claim has merit. (The court seemed less receptive to the First Amendment claim, as its Order tended to focus on the substantive flaws of the RMAR's arguments.) Thus, while the court denied the RMAR's motion for preliminary injunction, the RMAR could still ultimately succeed in the suit and, if so, potentially obtain a permanent injunction that would prevent enforcement of the EPEW's posting provisions. It will be important for employers to continue to comply with the EPEW's posting requirements in the meantime.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following authors:

Jessica Brown – Denver (+1 303-298-5944, jbrown@gibsondunn.com)
Marie Zoglo – Denver (+1 303-298-5735, mzoglo@gibsondunn.com)

Labor and Employment Group:
Jason C. Schwartz – Co-Chair, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)
Katherine V.A. Smith – Co-Chair, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)
Rachel S. Brass – San Francisco (+1 415-393-8293, rbrass@gibsondunn.com)
Jessica Brown – Denver (+1 303-298-5944, jbrown@gibsondunn.com)
Catherine A. Conway – Los Angeles (+1 213-229-7822, cconway@gibsondunn.com)
Jesse A. Cripps – Los Angeles (+1 213-229-7792, jcripps@gibsondunn.com)
Theane Evangelis – Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com)
Gabrielle Levin – New York (+1 212-351-3901, glevin@gibsondunn.com)
Michele L. Maryott – Orange County (+1 949-451-3945, mmaryott@gibsondunn.com)
Karl G. Nelson – Dallas (+1 214-698-3203, knelson@gibsondunn.com)
Molly T. Senger – Washington, D.C. (+1 202-955-8571, msenger@gibsondunn.com)
Greta B. Williams – Washington, D.C. (+1 202-887-3745, gbwilliams@gibsondunn.com)